IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1411

ST. LOUIS BOARD OF EDUCATION,
Petitioner,

v.

EARLINE CALDWELL, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,
Respondents,

and

CRATON LIDDELL, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Louis shall meet, as minimum constitutional requirements, the standards imposed upon the school districts of Detroit and Atlanta with predetermined racial quotas and massive cross-city busing of students, when

(a) there are no findings of any constitutional violation on the part of defendants;

(b) there are no findings that, absent certain conduct of defendants, the St. Louis Public School System would be integrated to the extent of the Appellate Court's purported requirements; and

(c) the remedy intimated by the Appellate Court is so sweeping as to encompass the whole school system, irrespective of the age of the children, of distances involved, and of any consideration for the constitutional and statutory validity of the neighborhood school concept 3

3. Whether the Court of Appeals erred in granting the Application for Intervention of the NAACP et al., in disregard of the discretion vested in the District Court to determine timeliness and adequacy of representation, without any finding that there was an absue of discretion on the part of the District Court regarding each such issue 3

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The petitioner, the Board of Education of the City of St. Louis prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 13, 1976, and its order of January 17, 1977, overruling the motions for rehearing.

I. OPINIONS BELOW

The December 13, 1976 opinion of the Court of Appeals, and its order of January 17, 1977, are not yet reported, and appear in the Appendices to this petition No. 5, pp. A-14-26 and No. 6, p. 27 and R. Vol. III, pp. 1-17. The judgments of the District Court of December 24, 1975 and of January 23, 1976 are not reported, and are set out in the Appendices to this petition No. 3, pp. A-7-11 and No. 4, pp. A-12-13 and R. Vol. II, pp. 13-14 and Vol. I, pp. 296-297.

II. JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on December 13, 1976 (Appendix No. 5, pp. A-14-26 and R. Vol. III, pp. 1-15), the motions for rehearing were overruled on January 17, 1977 and the mandate was ordered to be issued on January 28, 1977 (Appendix No. 6, p. A-27 and No. 7, pp. A-28-30 and R. Vol. III, pp. 36-39).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III. QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in defining the St. Louis Public School System as "de jure" segregated, and thereupon intimating that the District Court should require the defendants to adopt desegregative standards above and beyond the requirements of the Consent Judgment and Decree,

(a) without regard for the rule that racial imbalance in the enrollment in individual schools is not the equivalent of intentional discriminatory conduct, particularly in a system as St. Louis where the black "minority" is 71% and the white "majority" is 29%, and where the two races are heavily concentrated in different sections of the city for reasons beyond the control of the defendants, and

(b) without regard to whether any official act of the defendants reflects a racially discriminatory purpose, and without regard for the fact that the Court's conclusionary assertions contradict the findings of fact by the District Court, and challenge the constitutional validity of the Consent Judgment and Decree of the District Court which was not before the Appellate Court for review.

2. Whether the Court of Appeals erred in purportedly directing that the public schools of the City of St. Louis shall meet, as minimum constitutional requirements, the standards imposed upon the school districts of Detroit and Atlanta with predetermined racial quotas and massive cross-city busing of students, when

(a) there are no findings of constitutional violation on the part of defendants;

(b) there are no findings that, absent certain conduct of defendants, the St. Louis Public School System would be integrated to the extent of the Appellate Court's purported requirements; and

(c) the remedy intimated by the Court of Appeals is so sweeping as to encompass the whole school system, irrespective of the age of the children, of distances involved, and of any consideration for the constitutional and statutory validity of the neighborhood school concept.

3. Whether the Court of Appeals erred in granting the Application for Intervention of the NAACP et al., in disregard of the discretion vested in the District Court to determine timeliness and adequacy of representation, without any finding that there was an abuse of discretion on the part of the District Court regarding each such issue.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment to the United States Constitution, Section I:

> ". . . nor shall any such State . . . deny to any person within its jurisdiction the equal protection of the law."

B. United States Code, Title 20:

> § 1712. Formulating remedies; applicability
>
> In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek to impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.
>
> § 1751. Prohibition against assignment or transportation of students to overcome racial imbalance.
>
> No provision of this Act shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.
>
> § 1754. Provisions respecting transportation of pupils to achieve racial balance and judicial power to insure compliance with constitutional standards applicable to the entire United States.
>
> The proviso of section 2000c-6(a) of Title 42 providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power

> of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV, under all circumstances and conditions and at all times in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

V. STATEMENT OF THE CASE

The complaint commencing this school desegregation action was filed in the United States District Court for the Eastern District of Missouri on February 18, 1972 by black parents and their minor children attending the public schools of the City of St. Louis, on behalf of themselves and all other children and parents similarly situated. Named as defendants were the Board of Education of the City of St. Louis, its twelve members, and six top administrators. Federal jurisdiction was asserted under 28 U.S.C. 1343 (3), (4); 28 U.S.C. 2201; and 42 U.S.C. 1983, 1988 and 2000d, and the Fourteenth Amendment to the Constitution.

The complaint charged the defendants with racial segregation and discrimination in the operation of the St. Louis Public School System as the natural and foreseeable effect of the assignment of students and teachers, the allocation of educational resources, and buildings and separate and discriminatory curriculum (R. Vol. I, pp. 16-18; § 16 and 18). All charges were denied in defendants' answer (R. Vol. I, pp. 21-26).

Plaintiffs' request to proceed as a class action was first denied by the District Court on May 25, 1973 and then granted on

October 3, 1973. Under the court's order, notice was published that interested parties may intervene by December 1, 1973 (Appendix No. 1, pp. A-1-4 and R. Vol. II, pp. 4-7). Neither the NAACP nor anyone else applied, and on June 21, 1974 the court confirmed its order that the action may be continued as a class action represented by the plaintiffs (Appendix No. 2, pp. A-5-6 and R. Vol. I, pp. 27-28).

Extensive discovery was had by both sides through interrogatories, depositions and requests for admissions (R. Vol. I, pp. 2-4).

On October 30, 1973 defendants filed their motion for an order to join as additional parties defendant the Governor, the Attorney General, and the Commissioner of Education of the State of Missouri, the State Board of Education of Missouri, the St. Louis County Board of Education, the St. Louis County Superintendent of Education, and the twenty school districts in St. Louis County which constitute the first two tiers of school districts adjoining the defendant school district of the City of St. Louis (R. Vol. II, pp. 8-9). The plaintiffs opposed the motion, which was denied on December 1, 1973 (R. Vol. II, p. 10).

On June 7, 1974, the parties filed a Stipulation of Fact which obviated the trial (R. Vol. I, pp. 29-80). The salient facts set forth in the Stipulation will be summarized here.

The boundaries of the School District of the City of St. Louis comprising 61.37 square miles are coterminous with those of the City and have remained the same since they were established by the Missouri legislature in 1876 (R. Vol. I, pp. 32-33). Following *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), the Board of Education adopted a desegregation program which eliminated race as a required criterion for determining eligibility to enroll in any public school of the system (R. Vol. I, p. 42). All references to race were eliminated in the records of the public schools from 1954 until

1962, when the first racial count was taken upon recommendation of the U.S. Commission on Civil Rights (R. Vol. I, pp. 42-43). Attendance was determined on the basis of the neighborhood school concept, excepting special schools which were open to city-wide enrollment (R. Vol. I, pp. 41, 42 and 56-59).

Notwithstanding the actions taken by the Board over the years, certain conditions of de facto segregation are present in the public school system (R. Vol. I, p. 41) which includes a number of schools characterized by a significant racial imbalance in the enrollment. Contributing factors to these conditions have been certain discriminatory practices against blacks which continued to exist in St. Louis: the segregated policy of F.H.A. regarding financing, red-lining of areas by insurance companies and lenders, the failure of city officials to enforce the bulding coces, and others (R. Vol. I, p. 33).

During the last two decades, the demographic configuration of the city and of the public school enrollment underwent a series of very radical changes. The population of the city decreased from 856,796 in 1950 to 622,236 in 1970 with a corresponding increase in the population of the adjoining St. Louis County from 406,349 in 1950 to 951,353 in 1970. On the other hand, the percentage of blacks in the City increased from 17.9% in 1950 to 40.9% in 1970 and 42% in 1974, while remaining almost stationary in the County at less than 5% (R. Vol. I, pp. 34-35, 39). The quantitative increase of the black population of the City was accompanied by the massive intra-city movement of 50% of the blacks from the inner-city to the Central West End and later to the Northwest area of the City. This resulted in high black population density in the receiving areas from which whites had moved out and depopulation in the abandoned areas (R. Vol. I, pp. 35-36).

The racial change is far more pronounced in the public school enrollment due to the greater proportion of black families than white in the child-bearing age bracket, higher proportion

of white students in private schools, and the disproportionate ratio of elderly people among the white population remaining in the City (R. Vol. I, p. 39). Black enrollment in the public schools increased from 30.8% in the elementary schools in 1950 to 69.9% of the total public school enrollment in 1974 and 70.3% of the 88,499 enrollment in 1975 (R. Vol. I, pp. 39, 99, 128).*

These racial migrations and resulting concentration of racial groups in different areas of the City are reflected in the racial configuration of individual schools. Fourteen schools which had a completely white enrollment in the school year 1953-54 were over 90% black in the school year 1962-63.**

Of the 30 regular elementary schools which in the 1962-63 school year had a black enrollment in the range of 10% to 80%, 14 reached a black enrollment of over 91% by the school year 1973-74 (R. Vol. I, pp. 62-63).

The record shows that when the black enrollment in a school has reached the 50% level, it will increase to the 90% level within the average period of less than four years (R. Vol. I, p. 145).*** A comparable analysis of the schools which have reached a black enrollment of about 70% shows that within the

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* In the 1976-1977 school year, the student body dropped to 82,905, while the percentage of black students increased to 71.1% (Report under paragraph 11 of the Consent Judgment and Decree filed by defendants in the District Court on January 3, 1977).

** Exhibit 22 to the Stipulation of Facts filed in the District Court on June 7, 1974, which is too bulky for reproduction, shows that these schools are Arlington, Ashland, Chouteau, Clark, Columbia, Dozier, Emerson, Farragut, Gundlach, Hempstead, Laclede, Scullin, Soldan and Vashon.

*** These statistics of the St. Louis Public School System find support in the Report of the United States Commission on Civil Rights, Desegregation of the Nation's Public Schools, August 1976, p. 147, wherein it is stated: "The data do show that loss of white students is greater where black enrollments exceed 40 percent."

average period of about 2 years the black percentage increased to the 90% level (R. Vol. I, p. 149). These analyses further disclose that these racial changes have remained irreversible.

New schools which were planned and established by the Board in locations which presented the opportunity for integrated enrollment became almost entirely black within a few years after they were opened, and some were already black by the time the school was completed (R. Vol. I, pp. 60-62).

In the school year 1975-76, there were 135 regular elementary schools, and 12 special elementary schools for pupils with physical and mental handicaps or other problems (R. Vol. I, pp. 138-139, 52). Of the regular elementary schools, 48 had a completely black and 15 a completely white enrollment (R. Vol. I, p. 138). None of the special elementary schools had a completely white enrollment and 3 had all black pupils (R. Vol. I, p. 139).

There were 10 academic high schools, one ninth grade center and 6 specialized high schools. None of these had a completely white enrollment. An all black enrollment exists in four academic high schools, the ninth grade center and two specialized high schools for students with special problems* (R. Vol. I, pp. 139, 136, 51).

O'Fallon, the vocational high school of the system has a wholly integrated body of 3,308 students. These students, who spend half-a-day at O'Fallon, are listed in the racial count of their respective high school, which they attend for the other half day (R. Vol. I, pp. 55, 108). In addition, the Board operates

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* These data are derived from defendants' Exhibit 58 which was filed in the District Court on November 13, 1975. The asterisk referring to a footnote is set out at p. 139 R. Vol. I, but the footnote explaining that the ninth grade center was counted as a high school was omitted in the reproduction process of appellants' Appendix which became Vol. I of the present record.

Harris Teachers College which has an enrollment of 889 students, of whom 66% are black (R. Vol. 1, p. 128).

As to personnel, the record shows that the Board of Education is composed of twelve elected members, four of whom, inclusive of the President, at the time the suit was filed and most of the time thereafter, are black (R. Vol. I, p. 127). Of the top 26 administrative positions, 12 are filled by blacks, including the deputy superintendent who is the second highest official of the system (R. Vol. I, p. 164). The racial composition of the whole administrative staff consists of 163 (41.3%) whites and 232 (58.7%) blacks (R. Vol. I, p. 158).

Class-room teachers consist of 1,361 (40%) whites and 2,014 (60%) blacks (R. Vol. I, pp. 150-155).

Of the 2,220 non-certificated employees, 56.53% are black (R. Vol. I, p. 156).

The instructional curriculum is the same for all elementary schools, except for special remedial reading programs given in 71 schools (R. Vol. I, p. 73). In the high schools the curriculum is established on a city-wide basis, with flexibility in elective course offerings in the academic high schools (R. Vol. I, p. 74).

The budget in the schools is established on a system-wide basis, with funds allocated for programs and staff throughout the system and not by school (R. Vol. I, p. 76).

On December 24, 1975 the District Court entered a Consent Judgment and Decree (Appendix No. 3, pp. A-7-11 and R. Vol. I, pp. 188-193) which had been agreed to by the parties (R. Vol. II, p. 12). No finding or conclusion of constitutional violation on the part of any defendant is contained in that judgment. Moreover, it is specifically provided therein that: "Nothing herein contained shall be deemed to be an admission on the part of defendants that the charges contained in plaintiffs' Complaint, as amended, are true." The same paragraph of the judgment repeats the statement of the Stipulation of Facts: ". . . notwithstanding the actions taken by the Board subsequent to *Brown v. Board of Education of Topeka*, 347 U.S. 483, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts." (Appendix No. 3, p. A-8 and R. Vol. I, p. 190).

The Consent Judgment and Decree requires a number of steps to be taken by defendants with regard to personnel, location of schools, reduction of racial isolation in the academic high schools, establishing elementary and secondary magnet schools, and providing curricular improvements, all directed to reduce racial isolation in the schools. The lack of specificity in some of the provisions of the judgment was due to the recognition by the District Court and the parties that this would make the school district eligible for H.E.W. funding of the magnet school program. Such funding, which was essential to establish this program, was subsequently granted by H.E.W.

Implementation of the Consent Judgment and Decree was started immediately and has been carried out in accordance with the time schedule set forth by the District Court.

On the same day the judgment was entered, the District Court also issued an order that notice of the judgment be published advising all members of the class and other interested parties that they could file objections to the judgment, and that a hearing would be held on such objections on January 23, 1976 (Appendix No. 4, pp. A-12-13 and R. Vol. I, pp. 194-195) (R. Vol. II, pp. 13-14).

On January 16, 1976 objections to the judgment were filed by the Missouri State Teachers Association and by the St. Louis Teachers Union, Local 420 (R. Vol. I, p. 6). Neither of these

organizations sought to participate in the appellate proceedings. Also, the NAACP and some black pupils filed a motion to intervene as plaintiffs, and presented written objections to the Consent Judgment and Decree, requesting "immediate two-way reassignment of pupils" (R. Vol. I, p. 202). Within the geographical and demographic context of the St. Louis school population, this request carries the corollary of massive cross-city busing of pupils.

At the hearing on January 23, 1976, the court asked the applicants if they desired to put on evidence and the response was negative (R. Vol. I, pp. 257-258). After argument of counsel, the District Court denied the motion to intervene on the grounds that it was untimely, and the class is adequately represented; all interested parties including the NAACP were given the opportunity to file suggestions with and be heard by the court from time to time regarding the Consent Judgment (R. Vol. I, p. 295). As of the time the appeal was decided, no such suggestions had been filed by the NAACP or the other applicants for intervention.

On December 13, 1976, on appeal by the NAACP, the Court of Appeals for the Eighth Circuit reversed the order of the District Court of January 23, 1976, and held that the motion of the NAACP, et al. to intervene was not untimely and the class was not properly represented (Appendix No. 5, pp. A-14-26 and R. Vol. III, pp. 1-17). The Eighth Circuit added (i) that the Consent Judgment and the Decree did not meet the standards set forth in *Bradley v. Milliken*, 540 F. 2d 229 (6th Cir. 1976) cert. granted — U.S. — 50 L.Ed. 2d 325 (1976), as to the Detroit schools, and in *Calhoun v. Cook*, 522 F. 2d 717 (5th Cir. 1975), as to the Atlanta schools: a minimum ratio of 30% black students in each school of those systems; and (ii) that anything less in St. Louis "would fall short of constitutional requirements" (Appendix No. 5, p. 25 and R. Vol. III, p. 13). In its sweeping language, the Eighth Circuit appears to encompass

also all elementary schools of the St. Louis School District, whereas the realignment required in the Consent Judgment and Decree was directed to high schools only, while other desegregation measures were addressed to the elementary schools.

The premise of the ruling of the Eighth Circuit is the finding that the St. Louis Public School System is "admittedly de jure" (R. Vol. III, p. 9). In fact there is no such admission either in the Stipulation of Facts, or in the Consent Judgment and Decree. These two documents constituted the entire record before the Court of Appeals. Contrary to the stated finding of the Eighth Circuit, the Stipulation admits only the presence of certain instances of segregation "as a matter of fact" (R. Vol. I, p. 41).* The same restrictive language is contained in the Consent judgment and Decree, which further provides that nothing therein contained shall be deemed to be an admission by the defendants that the charges made in the complaint are true (Appendix No. 3, pp. A-7-8 and R. Vol. I, p. 190).

On December 27, 1976, this petitioner filed its petition for rehearing and in the alternative for rehearing by the Court of Appeals for the Eighth Circuit en banc (R. Vol. III, pp. 18-30). On January 17, 1977 the petition was denied by the Court of Appeals (Appendix No. 6, p. 27 and R. Vol. III, p. 36). The decision was 5 to 3 with the Chief Judge Floyd R. Gibson and Circuit Judges Roy L. Stephenson and William R. Webster voting to grant the petition.**

On January 28, 1977, in denying petitioner's motion for stay of the mandate pending petition for certiorari, the appellate

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* The opinion itself notes that "the stipulation appears to fairly set forth the basic history and statistics of the St. Louis school system" and that the applicants for intervention "do not attempt to assert a right to relitigate or undo the factual stipulations of the parties" (Appendix No. 5, p. A-18 and R. Vol. III, p. 6).

** St. Louis Post-Dispatch of January 30, 1977.

court added a two page explanation of its ruling. The court reiterated that "the merits of the consent decree were not before this court" and stressed the obligation of the parties to implement the consent decree according to its schedule (Appendix No. 7, pp. A-29, 30 and R. Vol. III, pp. 37-39).

Yet the appellate court ordered the granting of intervention of parties which have bottomed their intervention on an untenable position: massive two-way busing to achieve 70-30% (now 71-29%) racial balance in each school (R. Vol. I, p. 202).

On February 22, 1977, this court denied petitioner's application to recall and stay the mandate, by a four to four vote, with Mr. Justice Marshall taking no part in the consideration or discussion of the application.

VI. REASONS FOR GRANTING THE WRIT

The judgment of the Eighth Circuit Court of Appeals should be reviewed because:

(A) The judgment erroneously undertakes to require a remedy which is in conflict with the prohibitions and requirements of this court in *Washington v. Davis*, 426 US 229 (1976), *Austin Independent School District v. United States*, — U.S. —, 50 L.Ed2d 603 (1976), *Village of Arlington Heights, et al. v. Metropolitan Housing Corp., et al.*, — U.S. —, 50 L.Ed.2d 450 (1977); *Metropolitan School District v. Buckley*, — U.S. —, 45 U.S.L.W. 3500 (1977), and *Keyes v. School District No. 1, Denver*, 413 U. S. 189 (1973), as well as with the Equal Education Opportunities Act of 1974, 20 USC § 1712.

(B) The judgment erroneously undertakes to establish minimum racial quotas for the schools of the system, with the resulting effect of disestablishing the neighborhood school policy of this petitioner, and replacing it with massive, cross-town busing—all measures which are in conflict with *Austin Independent School District v. United States*, — U.S. —, 50 L.Ed.2d 603 (1976), the concurring opinion therein of Justice Powell, Chief Justice Burger and Justice Rehnquist and *Pasadena City Board of Education v. Spangler*, — U.S. —, 49 L.Ed.2d 599, 607 (1976), as well as the Equal Education Opportunities Act of 1974, 20 U.S.C. §§ 1712, 1751 and 1754.

(C) The judgment erroneously seeks to impose the foregoing remedies which impair the validity of the Consent Judgment and Decree, the merits of which the appellate court admitted were not before it, through the vehicle of granting the application for intervention of the NAACP et al. By overruling the District Court, which correctly held in its discretion that the application was untimely filed, the Eighth Circuit is in conflict with this Court's decisions in *NAACP v. New York*, 413 US 345 (1973),

and *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944).

Should this Court fail to grant certiorari in this case and resolve the issues presented, the Eighth Circuit will have established a precedent which will have a most serious effect on pending and future cases in the school desegregation area, both as to substance and procedure. On the substantive side, it seeks to mandate remedies which have been rejected by this Court and by the Congress. On the procedural side, it has undertaken to rule, through the backdoor of the intervention, upon a judgment which admittedly was not before the appellate court for review on the merits.

The gravity of the consequences resulting from the uncertainty and confusion created by the appellate judgment is compounded by the nature of the area affected. There is not a more sensitive and critical sector in the fabric of our society than race relations in the public schools. This condition is aggravated when the racial percentage of the student body is, as in St. Louis, one in which the traditional minority (black) has become the actual majority (71%). This radical transition occurred in the course of a trend which has reversed the percentages of racial enrollment in the public school within the span of the last two decades.

The Fourteenth Amendment does not mandate either confusion or the application of quotas, which are the antitheses of a free society, will lead to resegregation and will have the ultimate result of a wholly black unitary school system.

Certainty is a basic goal of the law. Certainty was dealt a major blow by the appellate judgment. This Court alone can rectify this perilous situation before further disruption may develop, with the opening of the new school year in September 1977.

A

The Prescription of a Remedy by the Appellate Court in the Absence of a Constitutional Violation Conflicts With Swann, Washington, Austin, Arlington Heights, Indianapolis, Keys, Milliken and § 1712 of Title 20 USC.

The appellate court erroneously undertook to set binding parameters for the plan to be adopted by the District Court. Not only was there no finding *of constitutional violation* made by the District Court, but its findings of fact stand unreversed. Hence, the prescription for the remedy set forth by the appellate court reaches beyond the scope of the Consent Judgment and Decree without any finding to warrant or support it.

The assumption by the appellate court that the St. Louis public school system is "admittedly de jure" (R. Vol. III, p. 9) is unsupported by the record. No such admission by the defendants is to be found anywhere in the record. Furthermore the record shows that the contrary is true. Both the Stipulation and the Consent Judgment and Decree admit the presence of some facets of de facto segregation. The Stipulation, however, describes in some detail the extrinsic forces which caused that condition, all beyond the control or the responsibility of this petitioner. The Consent Judgment and Decree adds that, by agreeing to its provisions, defendants do not admit that the charges in the complaint are true. Moreover the merits of the Consent Judgment and Decree were not before the appellate court, as it admitted three times (Appendix No. 5, pp. A-16, 23 and Appendix No. 7, p. 29 and R. Vol. III, pp. 3, 12 and 38).

Notwithstanding this factual and legal posture, the Eighth Circuit issued its peremptory command that "In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-1978 school year" (Appendix No. 5, p. 26 and R. Vol. III, p. 14).

Thus, the appellate court erred in its factual premise. Then it compounded that error by adding thereto: (i) the jurisdictional error of passing on a judgment which admittedly was not subject to review, and (ii) the most critical substantive error of formulating legal conclusions and fashioning remedies which are unwarranted. The court's error is demonstrated by the conclusive reason that the basis of a constitutional violation was wanting. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 (1971); *Milliken v. Bradley*, 418 US 717, 738 (1974); *Keyes v. School District No. 1, Denver*, 413 US 189, 200, 203, 208-9 (1973).

Consonant with these judicial determinations is § 1712 of Title 20 USC. This statute provides that a court can impose only those remedies which are essential to correct the particular constitutional violations involved.

Furthermore, the constitutional violation upon which judicial intervention is authorized is limited by the decisions of this Court in the *Keyes, Washington, Austin, Arlington Heights* and *Indianapolis* cases to intentional conduct. Mere racial imbalance in the schools is not sufficient evidence to prove discriminatory intent. This rule has particularly cogent applicability to the pending situation, where a student body of 71% blacks is bound to result in a significant number of wholly or predominantly black schools.

Applicable here is the statement of the concurring opinion in *Austin* that

> "The Court of Appeals did not find and there is no evidence in the record available to us to suggest that, absent those constitutional violations, the Austin school system would have been integrated to the extent contemplated by the plan." (50 L.Ed2d l.c. 605)

Similarly, in the present case there is no such evidence whatsoever.

B

The Imposition of Racial Quotas for the Schools of the System With Resulting Massive Cross-Town Conflicts With Austin, Pasadena, Swann, Carr and Sections 1751 and 1754 of Title 20 USC.

The appellate court intimated that anything less than a plan providing for a minimum of 30% black students in each school of the system "would fall short of constitutional requirements" (Appendix No. 5, p. A-25, R. Vol. III, p. 13). When this quota requirement is considered in the light of petitioner's long standing policy of neighborhood schools, and when consideration is given to the heavy concentration of the two races in the Southern (white) and North-west sections (black) of the City, the conclusion is inescapable that massive two-way cross-city busing is the only method of implementation.

Here the appellate court is in direct conflict with *Pasadena City Board of Education v. Spangler*, — U.S. —, 49 L.Ed.2d 599, 607 (1976), the concurring opinion in *Austin, supra*, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24, *Carr v. Montgomery County Board of Education*, 377 F.Supp. 1123 (M.D. Ala., 1974), aff'd. 511 F.2d 1374 (5th Cir. 1975), cert. den. 423 U.S. 986 (1975), and *Bradley v. School Board of City of Richmond*, 462 F.2d 1058, 1064, 1069 (4th Cir. 1972), aff'd, equally divided court, 412 U.S. 92 (1973). See also sections 1751 and 1754 of Title 20 U.S.C., which prohibit a court from ordering transportation for the purpose of racial balance.

This conflict is sharpened by the fact that the racial quota imposed on the Detroit schools, which quota the Eighth Circuit is purportedly mandating for St. Louis, was the answer of the Michigan courts to the numerous constitutional violations by the Detroit Board of Education, 338 F.Supp. 582, 589, 592

(E.D.Mich. 1971), aff'd 484 F.2d 215, 221 et seq. (6th Cir. 1975), 402 F.Supp. 1096, 1103 (E.D.Mich. 1975). No such findings are present in the instant case.

C

1. **By Allowing the Untimely Intervention of the NAACP Et Al. the Appellate Court Is in Conflict With NAACP v. New York, Allen Calculators, and Circuit Court Cases.**

2. **By Holding That Intervention Should Be Granted for the Proper Representation of the Class, on the Basis of Speculative Conclusions That the Consent Judgment and Decree Does Not Meet Constitutional Standards, the Appellate Court Is in Conflict With Circuit Court Cases and With the Washington and Related Decisions.**

1. The propriety of this action being maintained by plaintiffs as a class action was first denied (R. Vol. II, p. 1) and then sustained by the District Court (Appendix No. 1, p. A-1 and R. Vol. II, pp. 4-7). The second ruling, of October 3, 1973, was accompanied by an order of publication of its findings and notice that such parties as may desire could intervene by December 1, 1973 (Appendix No. 1, p. A-2 and R. Vol. II, pp. 6 and 7). The NAACP et al. had ample opportunity but failed to intervene by the prescribed time (R. Vol. I, pp. 27-28). Their application for intervention was filed more than two years later, on January 16, 1976 (R. Vol. I, pp. 201-204).

In reversing the trial court which had denied the application for intervention, the appellate court reasoned that the application was not untimely because the plan delineated in the Consent Judgment and Decree was not completed, and the applicants were seeking a broader plan. It is axiomatic, however, that applicants for intervention seek a greater relief than the party they wish to supplement or replace.

A similar situation, involving also a consent judgment to which the NAACP objected, was before this Court in *NAACP et al. v. State of New York et al.*, 413 U.S. 345 (1973). In that case the agreement of the parties to the consent judgment was reached on April 3, 1972, and the application for intervention by the NAACP was filed on April 7, 1972. Its denial by the district court as untimely was upheld by this Court, in application of the requirement of Rule 24 (a) and (b) that the application must be "timely". The determination of timeliness is to be made "by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review" (l.c. 366).

In the present case, no finding of abuse of discretion by the district court was made by the Eighth Circuit. Its decision is also in conflict with *Allen Calculators Inc. v. National Cash Register Co.*, 322 U.S. 137 (1944), which makes reviewability subject to a showing of a "clear abuse" (l.c. 142). To the same effect are: *Nevilles v. Equal Employment Opportunity Commission*, 511 F.2d 303 (8th Cir. 1975) and *City of Philadelphia v. Morton Salt Co.*, 385 F.2d 122 (3rd Cir. 1967), cert. den. 390 U.S. 995 (1968).

2. The appellate court's holding that the class was not properly represented is grounded on the conclusion that the Consent Judgment and Decree would not be constitutionally adequate, if the contentions of the applicants for intervention were correct. The court's conclusion contradicts the repeated disclaimers that the "merits of the consent decree are not before us". If the merits were not reviewed, as the court admits they could not be on that appeal, how can the court promulgate what appear to be mandatory standards and quotas to be applied to the public schools?

The confusion is compounded by the emphasis placed by the appellate court in its order of January 28, 1977 on the binding

effect of the Consent Judgment and Decree: it is described as "obligatory on the respective parties," which "parties have a constitutional obligation to proceed immediately to comply with the district court's order" (Appendix No. 7, pp. A-29, A-30 and R. Vol. III, p. 39).

Furthermore, the decision of the appellate court does violence to the rule that the determination of the adequacy of representation by existing parties upon an application for intervention is vested in the reasonable discretion of the trial court. *Rios v. Enterprise Ass'n Steamfitters Local, etc.*, 520 F.2d 352, 355 (2d Cir. 1975); *Chance v. Board of Education of City of New York*, 496 F.2d 820, 826 (2d Cir. 1974).

In this connection it should be noted that although the trial judge denied to NAACP et al. the status of parties, he granted to them the opportunity to present their suggestions to the court and to be heard during the further proceedings (R. Vol. I, p. 297). In *Chance*, supra, the Second Circuit considered such opportunity among the grounds for its decision affirming the denial of the application for intervention in that case (l. c. 826).

By adopting the NAACP's contention that they would obtain a greater degree of relief than is provided in the Consent Judgment and Decree, the Eighth Circuit is in conflict with the decisions which favor voluntary settlements by reciprocal concessions, and recognize that disagreements among lawyers about the conduct of a case are not sufficient showing of inadequate representation. *Air Lines Stewards and Stewardesses Association v. American Airlines, Inc.*, 455 F.2d 101 (7th Cir. 1972); *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir. 1976), cert. den. 96 S. Ct. 2628; and *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962).

Equally disregarded by the appellate court is the selected and generally accepted rule that "great weight" is accorded to the

views of the trial judge who approved the settlement terms, and "who is on the firing line and can evaluate the action accordingly". *Ace Heating & Plumbing Company, Inc., et al. v. Crane Company, et al.*, 453 F.2d 30, 34 (3d Cir. 1971); see also *Bryan v. Pittsburgh Plate Glass Company*, 494 F.2d 799 (3d Cir. 1974), cert. denied sub. nom. *Abate v. Pittsburgh Plate Glass Company*, 419 U.S. 900, reh. den. 420 U.S. 913 (1974); and *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975), cert. den. 423 U.S. 864 (1975).

Finally, the decision of the Eighth Circuit is in conflict with *Washington v. Davis* and related cases, supra p. 15, in that it is grounded on the conclusion that the inadequacy of the representation by the original plaintiffs is proven by their having agreed to the Consent Judgment and Decree which is or may be constitutionally inadequate and should be made to conform to the minimum standards selected by the appellate court.

VII. CONCLUSION

The Consent Judgment and Decree represents not only the agreement of the parties and the approval of the Chief Judge of this District who presided over this case for four years, but this consent solution also met with the general approval and satisfaction of the St. Louis community of both races. Strong endorsements were published by the editorial writers for the St. Louis Post-Dispatch and St. Louis Globe-Democrat (both catering primarily to white audiences) and by the editorial writers for the Argus and Sentinel (both catering primarily to black audiences) (R. Vol. II, pp. 16-19). Since the date of the Consent Judgment and Decree the process of implementation has proceeded basically in accordance with its schedule, with significant public acceptance.

The community needs stability, certainty, a feeling of reliance upon the court which has contributed so much to this sound

solution of a most vexing problem of a city, whose population is declining while the racial imbalance in the schools acquires an alarming proportion.

The appellate court has injected a confusing factor, which has obfuscated the scope and effectiveness of the Consent Judgment and Decree, in order to grant an application for intervention which was over two years belated. To justify its ruling, the Eighth Circuit has promulgated requirements which lack factual and legal basis, because of the absence of any finding of constitutional violation on the part of the defendants and because these requirements reach into the impermissible areas of arbitrary quotas for racial balance and massive cross-city busing. The conflict with this Court's decisions and with the congressional enactments is clear. Equally clear is the disruptive effect of said ruling upon the St. Louis School System, and the community at large.

Only this Court may restore order where confusion prevails. Only this Court may reassert the proper scope of the constitutional precepts as they apply to this school system in the context of the geographical and demographic characteristics of St. Louis.

The issues presented by this petition—prerequisites for the imposition of a remedy, arbitrary quotas for racial balance, massive cross-city busing, permissibility of belated and disruptive intervention—are critical issues not only in this case, but in numerous cases throughout the nation. Issues similar to those raised in this petition are presently before this Court in *Milliken v. Bradley*, No. 76-447, cert. granted 50 L.Ed. 2d 325 (1976), and *Dayton Board of Education, et al. v. Brinkman, et al.*, No. 76-539, cert. granted 45 U.S.L.W. 3489 (1977).

Furthermore, in the St. Louis situation some of the provisions of the Consent Judgment and Decree are required to be implemented by the beginning of the September 1977 school year. The appellate court decision impairs the necessary preparatory steps to implement those provisions of the Judgment.

It is respectfully submitted that this Court's consideration and ruling are essential to the proper operation of the Public School System of St. Louis and to maintain the spirit of cooperation of this community. This spirit, and the actions undertaken thereunder should not be destroyed for the sake of imposing racial quotas and massive bussing which would only lead to resegregation. A writ of certiorari should be granted.

Respectfully submitted

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APPENDIX

APPENDIX NO. 1—ORDER OF THE DISTRICT COURT OF OCTOBER 3, 1973

United States District Court
Eastern District of Missouri
Eastern Division

Craton Liddell, et al.,
Plaintiffs,
vs.
The Board of Education of the City of St. Louis, Missouri, et al.,
Defendants.
No. 72 C 100 (1)

MEMORANDUM AND ORDER

This matter is before the Court on plaintiffs' motion for reconsideration of the Court's denial of the maintenance of this action as a class action. The Court will allow this action to be maintained as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2).

Plaintiffs are the black students who attend or are eligible to attend the St. Louis Public Schools and their parents. The plaintiffs contend that the defendants have effected and perpetuated racial segregation and discrimination in their operation and maintenance of the St. Louis Public School District, in violation of the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution and the constitution and laws of the State of Missouri. Plaintiffs pray for injunctive relief against the defendants to secure plaintiffs' rights to a non-segregated, non-discriminatory school system.

This is an appropriate class action under 23(a) and 23(b)(2) and the plaintiffs may maintain this action as such on behalf of themselves and all those similarly situated. *Ware v. Estes*, 458 F.2d 1360 (5th Cir. 1972), aff'g 328 F.Supp. 657 (N.D.Tex. 1971); *Green v. Kennedy*, 309 F.Supp. 1127 (D.C. D.C. 1970); *Coffey v. State Educational Finance Commission*, 296 F.Supp. 1389 (S.D.Miss. 1969).

In view of the many persons this may affect, notice will be required in this case as set forth herein as a matter of due process of law, *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968). Also, such additional parties as may desire will have until December 1, 1973, to intervene in this action, accordingly,

It Is Hereby Ordered, Adjudged, and Decreed that this action may be maintained and is hereby recognized as a class action under Federal Rules of Civil Procedure 23(a) and (b)(2), on behalf of all black students, those who are eligible to be students, and their parents in the St. Louis Public School District.

It Is Further Ordered that such additional parties as may desire in the St. Louis Public School District may intervene on or before December 1, 1973.

It Is Further Ordered that notice of the pendency of this class action shall be published in the St. Louis Daily Record beginning Wednesday, October 10, 1973, and continue each Wednesday thereafter for four consecutive weeks.

It Is Further Ordered that the responsibility of publishing this notice in the newspapers and the costs and reasonable and necessary expenses thereto shall be paid by the plaintiffs, provided such costs and expenses shall be taxable as costs to abide the judgment of the Court.

It Is Further Ordered that the Clerk of the Court shall mail copies of the notice of the pendency of this class action to all television and radio stations listed in Southwestern Bell Tele-

phone Company's June 1973 "yellow pages" for the City of St. Louis, Missouri.

It Is Further Ordered, Adjudged, and Decreed that said notice shall read as follows:

"Notice of Pendency of Class Action

United States District Court
Eastern District of Missouri
Eastern Division

Craton Liddell, et al., Plaintiffs, vs. The Board of Education of the City of St. Louis, Missouri, et al., Defendants.	No. 72 C 100 (1)

To: All Students, Those Eligible to Be Students, and Their Parents in the St. Louis Public School District.

Notice is hereby given that an action has been commenced in the United States District Court at St. Louis, Missouri, by the above-named plaintiffs representing a class of all black students, those eligible to be students, and their parents, against the Board of Education of the City of St. Louis, its members, the Acting Superintendent of Schools, and the five District Superintendents of the St. Louis Public School System. By a court order dated October 3, 1973, this action may be maintained as a class action, pursuant to Rules 23(a) and 23(b)(2), Federal Rules of Civil Procedure.

In brief summary, plaintiffs allege that the defendants have discriminated against the plaintiffs by maintaining and operating a racially segregated school system, and seek an injunction requiring defendants to desegregate the public school system of St. Louis.

The defendants have filed an answer denying the material allegations of the plaintiff, including those allegations summarized above. Reference is made to the pleadings on file in the United States District Court at St. Louis, Missouri, for a complete statement of the positions of the plaintiffs and of the defendants.

This action was commenced on February 18, 1972, and is now set for trial on March 4, 1974.

Be advised that this Notice is not to be understood as an expression of any opinion by this Court as to the merits of any of the claims or defenses asserted by either side, but is published for the sole purpose of informing interested parties of the pendency of this litigation.

Now, therefore, take notice that such additional parties as desire, may intervene in this class action on or before December 1, 1973."

Dated this 3rd day of October, 1973.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX NO. 2—ORDER OF THE DISTRICT COURT OF JUNE 21, 1974

United States District Court
Eastern District of Missouri
Eastern Division

Craton Liddell, et al., Plaintiffs, v. The Board of Education of the City of St. Louis, Missouri, et al., Defendants.	No. 72 C 100 (1)

ORDER

It appears to the Court that pursuant to an order dated October 3, 1973, it was ordered that this cause be maintained as a class action on behalf of all black students, those who are eligible to be students, and their parents in the St. Louis Public School District. It further appears that notice was published by the plaintiff in the St. Louis Daily Record giving notice to all prospective members of the class and other interested parties. This notice ran on October 17, 24, and 31, and November 7, 1973, permitting any party to intervene in the class action on or before December 1, 1973. A copy of said notice was filed with the Court on March 8, 1974. It further appears to the Court that on October 3, 1973, the Clerk of the Court mailed copies of the order of October 3, 1973, and the notice to all television and radio stations listed in Southwestern Bell Telephone Company's June 1973 "Yellow Pages" for the City of St. Louis, Missouri. On the same date, a certificate was filed by the Clerk showing the mailing of this order

and notice to the television and radio stations. It further appears to the Court that no party requested intervention in this cause. Accordingly,

It Is Hereby Ordered that this cause may continue as a class action as originally designated.

Dated this 21st day of June, 1974.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX NO. 3—CONSENT JUDGMENT AND DECREE OF THE DISTRICT COURT OF DECEMBER 24, 1975

In the United States District Court for the Eastern District of Missouri, Eastern Division

Craton Liddell, et al., Plaintiffs, vs. The Board of Education of the City of St. Louis, State of Missouri, et al., Defendants.	No. 72C 100(1)

CONSENT JUDGMENT AND DECREE

On this 24th day of December, 1975, the parties hereto having appeared by counsel, and having consented, in the interest of the settlement of this litigation, as well as in the interest of saving the time, burden and expense of further hearings, subject to the approval of the Court, to the making and entering of this Judgment, as per memorandum filed herein under the date hereof, it is hereby

Ordered, Adjudged and Decreed that:

1. This Court has jurisdiction of the subject matter of this class action and of the parties hereto.

2. This Judgment and Decree is made and entered upon the Stipulation of Facts as amended and supplemented and upon the consent of the parties.

3. Nothing herein contained shall be deemed to be an admission on the part of defendants that the charges contained

in plaintiffs' Complaint, as amended, are true. However, notwithstanding the actions taken by the Board subsequent to *Brown v. Board of Education of Topeka*, 347 U.S. 483, as of this date hereof, segregation is present, as a matter of fact, in the Public School System of the City of St. Louis, in the particulars itemized in said Stipulation of Facts.

4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

5. With regard to the personnel of the St. Louis public schools, the defendants are directed and ordered to take the following measures which are necessary or proper in order to reduce racial segregation:

a) Effective before the beginning of the 1976-1977 school year, defendants shall have planned, developed and carried out a program through volunteers and, if necessary, through mandatory appointments and assignments, to provide a minimum of two regular classroom teachers and no less than 10% of the minority teachers and other staff of either race in each school of the system.

b) The minimum percentages provided for in the preceding paragraph shall be increased by defendants to no less than 20% of the minority teachers and other staff of either race in each school of the system before the beginning of the 1977-1978 school year, and to 30% of the teachers and other staff before the beginning of the 1978-1979 school year.

6. The measures required to be taken by the Board under the provisions of paragraph 5 hereof shall be taken notwithstanding any already signed and approved contract; and the tenure or seniority of teachers or other certificated personnel shall not be used to excuse or justify any lack of compliance with the provisions hereof.

7. Employees of the Board, whether certificated or not, shall not be discriminated against as to hiring, rehiring, promotion, dismissal, suspension or assignment on the ground of race or color, all subject to the procedural provisions of Title VII of the Civil Rights Act of 1964, as amended.

8. To the extent which is consistent with the proper operation of the school system as a whole, defendants shall locate any new schools, lease new classroom facilities or substantially expand existing schools with the objective of eradicating the effects of past and present segregation in the public schools of the City of St. Louis.

9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September, 1977.

10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:

a) Establishing elementary magnet schools with specialized curriculum, having an open enrollment by application.

b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and

natural sciences, and other subject areas, such schools having open enrollment by city-wide application.

c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of desegregating the school system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

11. Defendants are required to file with the Court, within sixty days from the opening day of the 1976-1977 school year a report setting forth the following information:

a) Tabulation by race of the enrollment in each school of the district.

b) List of each student, by name and address, who applied for transfer stating whether the application was granted, or, if not, the reason for the denial.

c) Tabulation of teachers by race for each school, listing the assigned grade or grades, and the vacancies which have been filled by the hiring of teachers from outside the system at each of the schools.

12. Defendants shall simultaneously mail copies of all reports filed with the Court to counsel for the plaintiffs. Plaintiffs' counsel shall be advised as to actions undertaken by the defendants in compliance with this Judgment.

13. Costs shall be taxed against the defendant Board of Education of the City of St. Louis and a reasonable attorneys' fee and expenses will be allowed against it and in favor of counsel for the plaintiffs.

14. Jurisdiction is retained for the purpose of enabling any of the parties to this Judgment to apply to this Court at any time for such further orders and directives as may be necessary or appropriate for the construction or carrying out of this Judgment.

Dated this 24th day of December, 1975.

/s/ JAMES H. MEREDITH
U. S. District Judge

APPENDIX NO. 4—ORDER OF THE DISTRICT COURT OF JANUARY 23, 1976

United States District Court
Eastern District of Missouri
Eastern Division

Craton Liddell, et al.,
Plaintiffs,
vs.
The Board of Education of the City of St. Louis, State of Missouri, et al.,
Defendants.
No. 72 C 100 (1).

ORDER

This matter is pending on various objections to the decree of December 24, 1975. The objections were filed by the Missouri State Teachers Association, St. Louis District; The St. Louis Teachers Union, Local 420, AFT; and the National Association for the Advancement of Colored People by its St. Louis Branch, along with certain minors under the age of twenty-one. It is also pending on the application of the National Association for the Advancement of Colored People by its St. Louis Branch, along with certain minors under the age of twenty-one, who allege they are members of the class, to intervene.

The Court has carefully considered the written statements filed with the Court and the argument of counsel and the objection to intervention filed by the plaintiffs and defendants in this case.

It Is Hereby Ordered that the objections to the decree are denied.

It Is Further Ordered that the School Board shall adopt a policy of transfer for personnel which shall be uniformly applied and shall be filed with the Court within thirty days from date.

It Is Further Ordered that the motion of the National Association for the Advancement of Colored People by its St. Louis Branch, along with certain minors, be and is denied for the reason that the application is untimely, the class is adequately represented, and the decree in its present form is adequate at this time.

It Is Further Ordered that all interested parties desiring to be heard concerning this cause may from time to time file suggestions with the Court and be heard.

Dated this 23rd day of January, 1976.

/s/ JAMES H. MEREDITH
United States District Judge

APPENDIX NO. 5—OPINION OF THE COURT OF APPEALS OF DECEMBER 13, 1976

United States Court of Appeals
For the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,

Appellees,

and

The Board of Education of the City of St. Louis, State of Missouri, et al.,

Appellees,

v.

Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,

Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 10, 1976

Filed: December 13, 1976

Before Lay and Bright, Circuit Judges, and Talbot Smith, District Judge.*

* Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

Lay, Circuit Judge.

In February 1972 five black parents and their minor children who were enrolled in the public schools in the city of St. Louis, filed a class action on behalf of themselves and others similarly situated, charging racial segregation and discrimination in the operation of the St. Louis Public Schools. They named as defendants the Board of Education of the City of St. Louis, the board members, the superintendent and district superintendents of the school system. On October 3, 1973, after discovery proceedings by all parties, the trial court allowed the case to proceed as a class action. By public notice the court invited other interested parties to intervene on or before December 1, 1973. No one applied for intervention.[1]

On February 24, 1974, the court requested that the parties file a written stipulation of facts. This was done on June 7, 1974. Exhibits filed with the stipulation have been continually supplemented to provide statistical data for the school years up to 1975-1976. On December 24, 1975, the parties entered into a consent decree which was approved by the trial court, the Honorable James H. Meredith, presiding. At that time the court ordered publication of the judgment to advise all members of the class and other interested parties that they should file any objections thereto by January 16, 1976. Six black pupils, through their parents and friends, and the St. Louis Chapter of the NAACP filed objections and sought to intervene.[2] The orig-

[1] On October 30, 1973, defendants filed their motion for an order directing the plaintiffs to join as additional parties defendant the Governor, the Attorney General, the Commissioner of Education of the State of Missouri, the State Board of Education of Missouri, the St. Louis County Board of Education, the St. Louis County Superintendent of Education, and the twenty school districts in St. Louis County which constitute the first two tiers of school districts adjoining the defendant school district of the city of St. Louis. The motion was denied on December 1, 1973.

[2] On January 16, 1976, objections to the judgment were also filed by the Missouri State Teachers Association and by the St. Louis Teachers Union, Local 420. Neither of these organizations has sought intervention.

inal plaintiffs and defendants resisted both the objections and the intervention motion. Following a hearing, Judge Meredith overruled the objections. He denied the application for intervention on the grounds that it was untimely and that the class was adequately represented. He also found that the decree was adequate for the present time and gave all interested parties the opportunity to make additional suggestions to the court from time to time. A timely appeal was taken from that order.

The only issue before us concerns the right of the appellants-petitioners to intervene. Although the petitioners urge us to pass upon the constitutional validity of the decree as well, we decline to do so for at least two reasons. First, the decree does not represent a plenary desegregation plan and concededly is interlocutory in scope. Second, the record is deficient as to investigation and scope of possible solutions and plans to implement an effective desegregation order within the St. Louis school system.

After reviewing the record, we conclude that the district court, which has retained jurisdiction of the case, erred in denying the appellants' motion to intervene. For the reasons stated, we do not pass upon the validity of the decree. Nonetheless, reference to the substance of the decree and to the claims of the respective parties is essential to the understanding of our ruling.

The petitioners seek intervention under Fed. R. Civ. P. 24 (a)(2).[3] Intervention of right is required under the rule when: (1) the petitioners assert an interest in the subject matter of the primary litigation; (2) there exists a possibility that the petitioners' interest will be impaired by the final disposition of the litigation; (3) there exists a danger of inadequate protection by the party representing the petitioners' interests; and (4) the petitioners have made timely application to intervene.

[3] Fed. R. Civ. P. 24(a)(2) reads as follows:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The parties generally agree that petitioners assert valid interests in the subject matter and that unless their interests are adequately represented those interests could be seriously harmed. We note public interest in the operation of a lawful school system and the fact that students and parents, regardless of race, have standing to challenge a *de jure* segregated school system. *See Johnson v. San Francisco Unified School Dist.*, 500 F.2d 349 (9th Cir. 1974); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). The denial of the motion to intervene in the present case rests on the alleged lack of timeliness and a finding that the class is already adequately represented.

Recent pronouncements by the Supreme Court[4] and this court[5] govern our consideration of petitioners' timeliness in seeking to intervene. The guiding factors include consideration of the progression of the suit, the reason for the delay, and the possible prejudice any delay due to intervention might cause the existing parties. More significant, however, is the rule that "[t]imeliness is to be determined from all the circumstances" of the case. *NAACP v. New York*, 413 U.S. 345, 366 (1973). Although precedents under Rule 24(a)(2) are helpful, each case must rise and fall on its own peculiar facts and circumstances.

In the present case, it is urged that the petitioners were given ample opportunity to participate in the case from the beginning and were, in fact, invited to intervene before December 1, 1973, by the trial court. Ordinarily this factor standing alone would

[4] *NAACP v. New York*, 413 U.S. 345 (1973).

[5] *National Farmers' Organization, Inc. v. Oliver*, 530 F.2d 815 (8th Cir. 1976); and *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975).

weigh heavily toward our sustaining the trial court's discretion in declining a petition to intervene made some three years later. *See United States v. Associated Milk Producers, Inc.*, 534 F.2d 113 (8th Cir. 1976). However, in the present case other factors must also be considered.

First, the reason given by petitioners for their failure to intervene earlier is that they concurred with the initial claims, seeking desegregation of the St. Louis school system, asserted by the original plaintiffs. Petitioners claim that there was nothing at that time, or at any other time until the consent decree appeared, to indicate to them that these shared claims were "being abandoned." Second, although the original complaint was filed in 1972, the present record is built upon stipulated facts which basically are not under attack; the stipulation appears to fairly set forth the basic history and statistics of the St. Louis school system. The petitioners do not attempt to assert a right to relitigate or undo the factual stipulations of the parties.[6] Third, the record indicates that a good deal of the delay from February 1972 to the time of the consent decree in December 1975 resulted from a stalemate between the parties as to how to achieve a plan of desegregation. Fourth, and of great significance to this court, is the fact that the district court, even as of this late date, has only partially approved specific plans for desegregation. The consent decree signed by the district court is interlocutory in nature, and as all agree, does not constitute the overall plan for desegregation. Under the district court order the school board is to make further study and must produce a "report" by January 15, 1977, with "implementation to begin September, 1977."

The petitioners' primary purpose in seeking intervention relates to their objections to the proposed remedy, that is, to the

[6] There have been extensive discovery procedures culminating in the stipulation. However, we note that when the court originally invited other interested parties to intervene in October, 1973, a great portion of the discovery proceedings had already taken place.

ultimate plan of desegregation. The petitioners urge that the consent decree falls short of requiring a plan which would comply with the constitutional mandate to create a unitary school system for St. Louis.

Considering all of these circumstances, and in view of the fact that only partial steps toward implementing a unitary school system have taken place, we find the district court erred in denying the petition for intervention for lack timeliness. Although the time for developing a plan has long since passed, *cf. Carter v. W. Feliciana Parish School Bd.*, 396 U.S. 290 (1970), unfortunately it is readily apparent that the complete desegregation plan is still on the drawing board. The record demonstrates that the effects of the previous *de jure* school segregation are still fully visible within the St. Louis school system.

As a second reason for rejecting the petition for intervention, the trial court found that petitioners' interests are being adequately represented. This finding is vigorously defended by the original plaintiffs and just as vigorously disputed by petitioners.

The controlling rule here is that representation is adequate if there is no collusion between the representative and an opposing party; if the representative does not have or represent an interest adverse to the applicant; or if the representative does not fail in the fulfillment of his duty. *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962), *cert. denied*, 373 U.S. 915 (1963). *See also Martin v. Kalvar Corp.*, 411 F.2d 552 (5th Cir. 1969); *Peterson v. United States*, 41 F.R.D. 131 (D. Minn. 1966). Petitioners are apparently relying on the third alternative indicating inadequate representation—failure to fullfill duty. In finding that intervention should be allowed, we do not in any way impugn any element of bad faith to the original plaintiffs or the school board by their agreeing to the consent decree. We are confident that all parties, as well as Judge Meredith and the

community at large,[7] have strived in good faith to find a workable solution to the difficult problem before them.[8]

The parties were faced with an admittedly *de jure* segregated school system whose district lines have been coterminous with those of the city since 1876. The total student population for the school term of 1975-1976 was 88,499 with the ratio of students being approximately 70% black and 30% white. Out of 147 public elementary schools in St. Louis the record shows

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[7] The School Board urges that the consent decree received the overwhelming approval of both races in the community and strong endorsements of the various St. Louis newspapers. The supplemental appendix, containing several newspaper articles printed following issuance of the consent decree, supports this contention. On the other hand, the same articles offer statements which, if true, would seem to support petitioners' contention that the parties have abandoned their goal of obtaining a plan for desegregation. For example:

St. Louis Post-Dispatch, December 24, 1975: "[T]he decree does not include any promises of specific changes besides the teacher transfers. . . ."

St. Louis Globe-Democrat, December 26, 1975, (quoting Ernest Calloway, an urban affairs expert and professor): "The whole problem has been one of quality, not whether black children have been going to school with white children."

St. Louis Sentinel, January 1, 1976: ". . . Black parents have merely wanted equality in teaching . . ."

Christian Science Monitor, January 16, 1976, (quoting Meyer Weinberg, nationally recognized expert on integration and lecturer at Northwestern University): "As long as a school system says 'we're not going to bus,' then they're not really going to desegregate."

St. Louis Post-Dispatch, January 18, 1976, (quoting original plaintiff. Liddell): "[I]n a city that is largely black, there might be some all-black schools. But all the children should have top-quality education and the option to go to an alternative school." The paper reports: "She said that she wanted to avoid massive court-ordered busing because . . . [it would] not necessarily improve the quality of education."

[8] The record reveals that since the consent decree the school district has broadened its magnet school program and has achieved some degree of success in doing so. However, in view of the small percentage of students participating, the magnet school program must be recognized as only an adjunct to a plan of desegregation and it cannot constitute the plan itself.

that 121 (82.3%) had enrolled 90% or more pupils of one race. Of these, 87 schools had 90% or more black, and 34 had 90% or more white. Furthermore, 51 elementary schools were 100% black and 15 were 100% white. At the high school level, 12 of the 17 schools (70.5%) were comprised of 90% or more pupils of one race. The enrollment in 11 high schools was 90% or more black and one high school had 90% or more white. Seven high schools were 100% black. Thus, in the entire public school system, a total of 55,713 black pupils were enrolled in schools 90% or more black, and 16,442 white pupils were enrolled in schools 90% or more white. The original complaint filed in 1972, and the proposed findings of fact and conclusions of law submitted by the original plaintiffs, sought an end to the *de jure* dual school system for all students and faculty, and with respect to curriculum. As late as September 1974, the original plaintiffs proposed findings of fact and conclusions of law in accord with the petitioners' claims here.[9]

Petitioners now allege that the plaintiffs have abandoned their original goal. This, they claim, is evidenced by plaintiffs' consent to the entry of the December 1975 decree One element of the decree which they specifically attack is its lack of an

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[9] The complaint filed by the original plaintiffs succinctly summarizes the relief sought by their proposed decree of September 1974:

> . . . that this court require the defendants to prepare and submit for approval of this court a plan for the operation of *all the public schools within the defendant Board of Education school system* in conformity with the requirements of the Fourteenth Amendment, including, but not limited to, the non-discriminatory allocation of financial and physical resources; *the establishment of school geographical boundaries and district geographical boundaries which are not racially identifiable; the location, construction and utilization of new buildings and the utilization of existing school buildings* in a manner which are (sic) not racially identifiable; *the assignment of pupil populations*, staffs, faculties, *transportation routes* and activities which are not racially identifiable; and that the plan be effective at the earliest possible date.

(Emphasis added).

attempt to integrate any of the elementary or junior high schools. They complain that the decree contains only a general direction to the school board to make a study on the realignment of feeder zones affecting the high schools. The only specifics of the consent decree relating to desegregation of students read:

> ORDERED, ADJUDGED AND DECREED that:
>
> . . . . . .
>
> 9. Before the beginning of the 1977-1978 school year, defendants shall make a study of realignments of all elementary feeder schools to the academic high schools for the purpose of reducing racial isolation and segregation at the said high schools, and shall submit a report thereon to the Court, on or before January 15, 1977, with implementation to begin September, 1977.
>
> 10. The defendants are hereby ordered to make a study and report to the Court on or before May 1, 1976 as to whether or not the following items will assist in eliminating or reducing segregation:
>
> (a) Establishing elementary magnet schoools with specialized curriculum, having an open enrollment by application.
>
> (b) Establishing high schools for the study of the visual and performing arts, for the study of mathematics and physical and natural sciences, and other subject areas, such schools having open enrollment by city-wide application.
>
> (c) Recognizing that the above measures are basically experimental in nature, a study of the feasibility of curriculum improvements or other changes that should be instituted in the system as a whole shall be undertaken for the purpose of increasing the quality of education throughout the system, all within the context of reducing racial isolation in the schools and with the goal of desegregating the schoool system. A report shall be made to the Court by May 1, 1976, with implementation beginning with the school year 1976-1977.

Consent Judgment and Decree, filed Dec. 24, 1975.

On appeal petitioners attack the decree by saying:

> The consent decree is constitutional (sic) inadequate in substance because it provides only for the transfer of personnel to desegregate the faculty of the public school system, and makes no provision for pupil reassignment.
>
> . . .
>
> . . . [T]he decree makes no provision for desegregation of the elementary schools, which are almost totally black in a school system which was previously segregated by state law. The decree includes only a limited opportunity for desegregation of a very few schools through "free choice" enrollment in so-called "magnet" schools. Furthermore, while calling for "studies" of the reassignment of elementary feeder schools, reports of these studies are not due until January 15, 1977, with implementation delayed until September, 1977.

As we stated earlier, we do not believe that the merits of the consent decree are before us, since we consider the decree interlocutory in nature. We do observe, however, that if the overall plan to be submitted by the board contains major deficiencies in the respects asserted, the plan will encounter serious constitutional objection.[10]

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[10] Great stress has been placed by the parties in achieving and improving the quality of education within the St. Louis schools. Although efforts to improve the quality of education for all students is desirable, this emphasis fundamentally misapprehends the constitutional requirement of achieving a unitary school system. The achievement of quality education is not premised on the equal protection clause of the Fourteenth Amendment. Prior to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), it had been urged that quality education could be made available to all students without integra-

In *Davis v. Bd. of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), the Supreme Court observed that: "[E]very effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation" must be made by school districts.[11]

In view of the difficult problems in working out a meaningful constitutional plan, we suggest to the district court that it invite the United States Department of Justice to intervene, and that the same invitation be extended to the Missouri State Board of Education. We recommend that the parties explore the creation of a bi-racial citizens advisory committee, which has worked so successfully in other areas of the country. The Supreme Court decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), seemingly deters the merger of two school districts unless racially discriminatory acts of one or more school

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tion. Separate but equal concepts have now long been rejected. Federal courts lack jurisdiction under the Fourteenth Amendment to require quality education in state school districts other than to erase the effects of prior school segregation. The sole goal of *Brown* is to erase the dual educational system and achieve unitary schools. Recognition of equal protection principles under the Fourteenth Amendment is focused on achieving a society that is not divided by skin color; to this end it is important that black and white children accept one another at an early age. *See Brown v. Bd. of Educ., supra*, 347 U.S. at 494; *Kemp v. Beasley*, 389 F.2d 178 (8th Cir. 1968). Segregated school systems have undoubtedly resulted in a loss of *equal opportunity* for quality education for all students. However, it is the "equal opportunity," not the quality education which is germane to the constitutional concern.

[11] If appellants' objections to the consent decree accurately anticipate the ultimate plan of the school board, we observe that such a plan would fall far short of the desegregation plans now required for the Atlanta, Georgia, and Detroit, Michigan, school districts.

As of September, 1975, the Detroit school district served 247,774 students with a 75/25 black-white ratio. Under the plan approved there 27,524 students were reassigned to integrated schools. The plan changed the racial balance of 105 of the approximately 300 schools in the system. Under the plan no school had less than 30% black students. The Sixth Circuit recently remanded the district court order for reconsideration in an attempt to desegregate further in three black residential areas excluded from the plan, and to inte-

districts caused racial segregation in an adjacent district, or unless district lines have been deliberately drawn on the basis of race. *But cf., Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, Ky.*, 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975). *See also United States v. Bd. of School Comm'rs of Indianapolis, Ind.*, 541 F.2d 1211 (7th Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3372 (Nov. 16, 1976); *Evans v. Buchanan*, 416 F. Supp. 328 (D. Del. 1976), *apppeal dismissed*, 45 U.S. L.W. 3393 (Nov. 30, 1976). However, investigation into the voluntary cooperation of the county in accepting minority transfers should not be overlooked. *Cf. Milliken v. Bradley*, 540 F.2d 229, 235, n. 3 (6th Cir.), *cert. granted*, 45 U.S. L.W. 3363 (Nov. 16, 1976).

In view of the delayed implementation of any plan, we direct the district court to immediately grant the appellants' petition for intervention. In order to avoid future piecemeal appeals, we additionally direct that the district court hear, as soon as possible, any objections to the school board's January 1977 plan, and that within a reasonable time prior to entering its approval the court require that the parties submit

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grate the faculties up to a 50/50 ratio. *See Milliken v. Bradley*, 540 F.2d 229 (6th Cir. 1976), *cert. granted*, 45 U.S.LW. 3363 (Nov. 16, 1976).

In Atlanta, Georgia, in 1975, 85% of students within the district were black, yet the most recent plan approved by the Fifth Circuit requires a 30% mix of black students in previous all-white schools. *Calhoun v. Cook*, 522 F.2d 717 (5th Cir.), *reh. denied*, 525 F.2d 1203 (1975).

The study of these two desegregation plans reveals that under those circumstances complete integration was impossible. Both plans necessarily left several all black schools. Yet such studies disclose that district courts and school boards, facing more difficult problems than presently confronting the St. Louis system, are using every effort possible to achieve desegregation of prior *de jure* school systems. It should be obvious that anything less than similar efforts in St. Louis would fall short of constitutional requirements.

alternate plans. In no event should implementation of plans for a unitary school system be delayed beyond the commencement of the 1977-78 school term.

Judgment reversed and remanded for further proceedings in the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX NO. 6—ORDER OF THE COURT OF APPEALS OF JANUARY 17, 1977

United States Court of Appeals
for the Eighth Circuit

76-1228 September Term, 1976

Craton Liddell, etc., et al., Appellees,

vs.

Earline Caldwell, et al., Appellants.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petitions of various appellees for rehearing en banc and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

January 17, 1977

APPENDIX NO. 7—ORDER OF THE COURT OF APPEALS OF JANUARY 28, 1977

United States Court of Appeals
for the Eighth Circuit

No. 76-1228

Craton Liddell, a minor, by Minnie Liddell, his mother and next friend, et al.,

Appellees,

and

The Board of Education of the City of St. Louis, State of Missouri, et al.,

Appellees,

v.

Earline Caldwell, a minor, by Lillie Caldwell, her mother and next friend, et al.,

Appellants.

Filed: January 28, 1977

ORDER

This matter comes before the court on defendant's motion for stay of mandate pending petition for certiorari. The motion is denied and the mandate is ordered to be issued forthwith.

In order for the parties and the district court to fully understand the court's denial of the stay, we set forth our reasoning.

The only issue decided by this court, as specifically recited in the court's opinion filed December 13, 1976, related to the district court's order denying the petition for intervention. The consent decree requiring integration of the St. Louis School District[1] entered by the district court on the 24th of December 1975, was interlocutory in form. In paragraph 9 of the decree the district court expressly ordered that a further report be made to the court, "on or before January 15, 1977, with implementation to begin September 1977."

The intervenors limited their objections to the decree to the proposed overall remedy and made substantial allegations that the original plaintiffs were not adequately representing the class in obtaining constitutional relief from an admittedly segregated school system. This court allowed intervention to assure the plaintiff class adequate representation and to provide the district court with meaningful input from all parties to achieve a constitutional plan. The merits of the consent decree were not before this court.

This court views the consent decree, although interlocutory as to remedy, still obligatory on the respective parties to go forward with implementation of a desegregation plan; we assume that in doing so all of the parties will proceed in good faith

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[1] Paragraph 4 of the consent decree reads:

4. Defendants, their agents, officers, employees and successors, and all those in active concert and participation with them shall be enjoined and prohibited from discriminating on the basis of race or color in the operation of the School District of the City of St. Louis, and shall be required to take affirmative action to secure unto plaintiffs their right to attend racially nonsegregated and nondiscriminatory schools, and defendants will afford unto plaintiffs equal opportunities for an education in a nonsegregated and nondiscriminatory school district, and shall be required to take the affirmative action hereinafter set forth.

to make "every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Comm'rs.*, 402 U.S. 33, 37 (1971).

Under the decree, the parties have a constitutional obligation to proceed immediately to comply with the district court's order to prepare a plan for its approval and to implement that plan beginning in September 1977. A further stay at this time, particularly in view of the fact that the consent decree is still interlocutory, would simply delay further implementation of that plan and the achievement of equal educational opportunity for the plaintiff class in a non-discriminatory school district.

It is so ordered.

By the Court

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit